STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAUL STILL,

Petitioner,

vs. Case No. 14-5658RP

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent,

and

SUWANNEE RIVER WATER MANAGEMENT DISTRICT, NORTH FLORIDA UTILITY COORDINATING GROUP, AND ST. JOHNS WATER MANAGEMENT DISTRICT,

Intervenors.
_____/

KATHLEEN STILL,

Petitioner,

vs. Case No. 14-6132RP

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent,

and

SUWANNEE RIVER WATER MANAGEMENT DISTRICT AND NORTH FLORIDA UTILITY COORDINATING GROUP,

Intervenors.
_____/

SUMMARY FINAL ORDER

Petitioner Paul Still, Respondent Department of Environmental Protection ("Department"), and Intervenor Suwanee River Water Management District filed motions for summary final order. A hearing on the motions was held on February 6, 2015, in Tallahassee, Florida, before Bram D.E. Canter, Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

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For Intervenor St. Johns River Water Management District:

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STATEMENT OF THE ISSUE

The issue to be determined in these consolidated cases is whether proposed Florida Administrative Code Rule 62-42.300 is an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

In March 2014, the Department proposed to adopt rules 62-42.100, 62-42.200, and 62-42.300, which would establish minimum flows for the Ichetucknee River and Lower Santa Fe River, together with their associated springs ("the MFL waterbodies") and establish special review criteria for proposed water withdrawals in the area of the MFL waterbodies. Petitioner Paul Still and two environmental associations challenged the proposed rules as invalid exercises of delegated legislative authority. Petitioner Still also challenged the Statement of Estimated Regulatory Costs ("SERC") the Department prepared in conjunction with the proposed rules. Following a DOAH hearing, a

Final Order was issued on September 11, 2014, which determined that proposed rules 62-42.100 and 62-42.200 were valid, but the minimum flows set forth in proposed rule 62-42.300 were invalid because they were vague. That rule challenge proceeding is referred to hereafter as "Still-I."

On November 7, 2014, the Department published a Notice of Change, which described changes to proposed rule 62-42.300 intended to address the vagueness issue. The Department also prepared an addendum to its SERC. Paul Still filed a petition challenging proposed rule 62-42.300; both the changed and the unchanged parts of the rule. He also challenged the SERC addendum. Subsequently, a nearly identical petition was filed by Paul Still's wife, Kathleen Still.

FINDINGS OF FACT

1. The parties agree and the Administrative Law Judge has determined that there exists no genuine issue as to any material fact.

2. In the December 4, 2014 SERC addendum, the Department described the changes to the proposed rule as follows:

> The Notice of Change filed on November 7, 2014 does not change the proposed minimum flows or the recovery strategy included in the proposed rules. The Notice of Change merely adds the existing technical information that the Administrative Law Judge found missing in the original rule text, which results in the proposed rule being

found by the Judge to be vague. Specifically, these changes include:

1) Adding the period of record used to establish the baseline flows in the Lower Santa Fe and Ichetucknee Rivers and subsequently used to develop the proposed minimum flows, and,

2) Adding the method used for filling the data gaps in the baseline flow record for the Ichetucknee River.

3. The Final Order in Still-I determined that the proposed minimum flows were vague because they did not include a period of record (of water flow data) to be used with the flow duration frequencies. Flow duration frequencies are percentages of time that a particular amount of flow (in cubic feet per second) is equaled or exceeded, which can vary depending on the period of record that is used. The proposed rule now describes the period of record that was used to derive the minimum flows.

4. Petitioners contend that the rule is still vague because the rule does not identify the period of record that will be used in the future to determine whether the minimum flows are being achieved. Petitioners expressed concern that Suwannee River Water Management District might use a scientifically unsound period of record to determine that the MFL waterbodies are no longer "in recovery."

5. Neither the Department nor Suwannee River Water Management District identified in Still-I or in this proceeding

the period of record that will be used to determine whether the minimum flows have been achieved. However, the Recovery Strategy for the MFL waterbodies is in its first phase. The rule contemplates that the MFL waterbodies will remain in recovery at least until completion of the North Florida Southeast Georgia Regional Groundwater Flow Model in 2019 and the MFLs and the Recovery Plan are re-evaluated with the model as part of phase 2. See proposed Fla. Admin. Code R. 62-42.300(1)(d). This interpretation was confirmed by the Department and the District at the hearing on the motions for summary final order.

6. The Supplemental Regulatory Measures (which are unchanged) do not require applicants for consumptive use permits to determine or show how a proposed withdrawal of water will affect the flow duration frequencies set forth in the rule. The period of record to be used in determining whether the minimum flows are achieved is not used in the permitting process.

CONCLUSIONS OF LAW

7. Any person substantially affected by a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority. § 120.56(1)(a), Fla. Stat.

8. A party may move for summary final order when there is no genuine issue as to any material fact. § 120.57(1)(h), Fla. Stat. The Administrative Law Judge has determined that no

genuine issue as to any material fact exists and the parties are entitled as a matter of law to the entry of a final order.

9. The doctrine of res judicata applies to bar a cause of action when that cause was fully adjudicated in a previous lawsuit between the same parties and a judgment on the merits was rendered. See Kimbrell v. Page, 448 So. 2d 1009 (Fla. 1984). The estoppel applies to every matter presented and every other matter "that might with propriety have been litigated and determined in that action." Id., at 1012.

10. The doctrine of collateral estoppel applies to bar the re-litigation of specific factual and legal issues that were previously adjudicated in a proceeding between the same parties, but involving a different cause of action. See Zimmerman v. Office of Ins. Reg., 944 So. 2d 1163 (Fla. 4th DCA 2006).

11. Res judicata and collateral estoppel serve to limit litigation by determining for all time an issue that has been fully and fairly litigated. Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano, 450 So. 2d 843, 845 (Fla. 1984).

12. In a challenge to a proposed rule, the issue for determination is often described as whether the rule is an invalid exercise of delegated legislative authority, but a proposed rule usually has several parts, each of which is subject to challenge on the same or different grounds of invalidity. Some parts of the rule may be determined to be valid exercises of

delegated legislative authority and other parts invalid. Therefore, a rule challenge can reasonably be viewed as a bundle of causes of action, each cause directed to a different part of the proposed rule. Res judicata applies to bar any one of these causes of action, once adjudicated, from being re-litigated between the same parties.

13. If instead, one views Still-I as involving a single cause of action--whether the rule as initially proposed was invalid--and the current proceeding as involving a different cause of action--whether rule 62-42.300, as changed, is invalid--then collateral estoppel bars the re-litigation of the factual and legal issues that were previously adjudicated in Still-I.

14. With regard to the unchanged parts of proposed rule 62-42.300, res judicata or collateral estoppel bars Petitioner Paul Still from claiming they are invalid.

15. When res judicata and collateral estoppel apply to bar a party's claims, they also bar the claims of a person in privity with that party, whether connected by contract, ownership, or other mutual interest. See Thompson v. Haynes, 249 So. 2d 69 (Fla. 1st DCA 1971). The Supreme Court of Florida has described privity for purposes of res judicata as the kind of mutual interest that makes one "virtually represented" in the previous lawsuit. See Stogniew v. McQueen, 656 So. 2d 917, 920 (Fla. 1995). See also Massey v. David, 831 So. 2d 226, 232 (Fla 1st

DCA 2002)("A person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative."); EEOC v. Pemco Aeroplex, Inc., 383 F.3d 1280, 1286 (11th Cir. 2004), quoted in Cook v. State, 921 So. 2d 631, 635 (Fla. 2d DCA 2005)("Privity is a flexible legal term, comprising several different types of relationships and generally applying when a person, although not a party, has his interests adequately represented by someone with the same interests who is a party.").

16. Paul Still was the virtual representative of Kathleen Still in Still-I because her identical claims and interests (regarding the unchanged parts of rule 62-42.300) were adequately represented by Paul Still, and those claims and interests were heard and determined.[1/] Therefore, Kathleen Still should also be barred from challenging the unchanged parts of proposed rule 62-42.300.

17. Petitioners contend that section 120.56(2)(a), Florida Statutes, affords Kathleen Still the right to challenge the entirety of rule 62-42.300 on the same grounds that were rejected in Still-I, because she has recently applied to the District for a consumptive use permit. Section 120.56(2)(a) states, in part:

> A person who is substantially affected by a change in the proposed rule may seek a determination of the validity of such change. A person who is not substantially affected by the proposed rule as initially

> noticed, but who is substantially affected by the rule as a result of a change, may challenge any provision of the rule and is not limited to challenging the change to the proposed rule.

18. First, Kathleen Still is not substantially affected as a result of the changes to the rule because the rule only adds clarification about how the minimum flows were derived. The changes do not affect the minimum flows or the Supplemental Regulatory Measures. Kathleen Still has standing to argue that the changes adversely affect her, but the plain language of the changes and the undisputed facts demonstrate that the changes do not substantially affect her. Therefore, section 120.56(2)(a) does not provide Kathleen Still a means to challenge the rule as initially noticed.

19. Second, Kathleen Still is estopped to challenge the unchanged parts of the rule. Her interests were adequately represented by Paul Still in Still-I. She stands in the same position as Paul Still, a person substantially affected by the rule as initially proposed. The permit application added to Kathleen Still's substantial interests for purposes of standing, but standing is not the issue; the issue is whether Kathleen Still may challenge the unchanged parts of the proposed rule. She is estopped from doing so.

20. The changes to the rule were added by the Department to cure the vagueness determined in the Final Order in Still-I.

Vagueness requires a determination that the rule forbids or requires the performance of an act in terms that are so vague that persons of common intelligence must guess at its meaning and differ as to its application. SW. Fla. Water. Mgmt. Dist. v. Charlotte Cnty., 774 So. 2d 903, 915 (Fla. 2d DCA 2001).

21. Petitioners are not estopped to present their claim that the changes do not cure the vagueness, but they failed to prove their claim. The rule is not vague.

22. The period of record that will be used to determine in the future whether the minimum flows have been achieved is not stated in the rule, but it can be determined later as part of the phase 2 re-evaluation of the minimum flows. The period of record must be identified in the rule at that time. Petitioners are not injured by the absence of this information in the rule now.

23. Petitioners' challenges to the SERC also fail. Because the changes to the rule simply add information about how the minimum flows were derived, there are no economic costs associated with the changes. That makes moot the debates about whether the lower cost regulatory alternative was timely or whether the SERC covered the wrong time period. All of Petitioners' other claims of invalidity directed to the SERC are barred by estoppel.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, it is determined that proposed rule 62-42.300 is a valid exercise of delegated legislative authority.

DONE AND ORDERED this 13th day of February, 2015, in Tallahassee, Leon County, Florida.

BRAM D. E. CANTER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of February, 2015.

ENDNOTE

1/ In her own case, Kathleen Still requested that Paul Still appear as her Qualified Representative.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.